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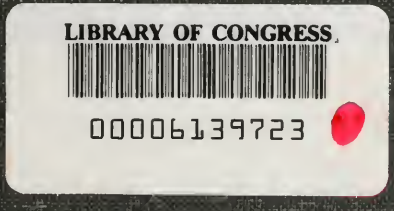

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JOHN W. ODOM

CONFEDERATE MEMORIAL

PRIZE ORATION

BY TONEY A. HARDY

JOHN W. ODOM CONFEDERATE MEMORIAL PRIZE ORATION

BY

TONEY A. HARDY.

Delivered at the University of Mississippi Annual Commencement, June 3, 1907.

What Constituted the Southern States the True Defenders of the Constitution and the Union.

"Rich in patriotism, in intellectual force, in civic and military achievements, she advances, bearing with her the proud heritage, advocated in council chamber, justified at the bar, and vindicated in battle, principles which constituted the Southern States the true defenders of the Constitution and the Union."

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EXPLANATORY

THE JOHN W. ODOM CONFEDERATE MEMORIAL PRIZE.

"Mr. John W. Odom, of DeSoto County, has donated to the University the sum of $2,000, 'the interest only of which shall be awarded each year as a prize to that student in the University of Mississippi who shall present the best essay or oration (1) in defense of the constitutional and legal right of the Southern States in 1861 to secede from the Federal Union, or (2) upon some topic the central thought and purpose of which shall be to defend the course of the people of the seceding States and their leaders, provided such essay or oration shall be approved, and such award shall be made by a committee of three disinterested judges appointed by the Chancellor of the University. At least every third year, commencing with the year 1906, the subject shall be a defense of the constitutional and legal right of the Southern States in 1861 to secede from the Federal Union. For the intervening years allied subjects as above indicated shall be chosen and assigned by the Chancellor of the University of Mississippi and his successors in office.

" 'The most meritorious essay or oration offered each year in competition, and for which the prize shall be awarded, shall be presented in public during the commencement exercises of the University, and other essays or orations offered in the same competition may be so presented if deemed advisable by the faculty of the University.

" 'The sum herein donated to the University of Mississippi for the purpose herein stated shall be known as the John W. Odom Fund, and the prize hereby founded and established in the University shall be known as *the John W. Odom Confederate Memorial Prize.*' "

RULES GOVERNING THE CONTEST FOR THE JOHN W. ODOM PRIZE.

1. The contest shall be open to all students of the University.

2. The prize shall be awarded upon the nature and scope of research and excellence of literary style.

3. The essays or orations submitted in competition shall have each not more than 4,000 words. The winning oration shall be limited to not more than twenty minutes in delivery.

4. The manuscripts in competition must be submitted in typewritten form, on standard thesis paper, to the Chancellor by May 15th each year in order to be considered.

5. The subject for 1907 is "What Constituted the Southern States the True Defenders of the Constitution and the Union."—*Catalogue of the University of Mississippi, April, 1907.*

In competition for this prize there were eight contestants, all Seniors, two from the Literary Department and six from the Law Department.

The committee, composed of Hon. J. H. Kimmons, Hon. H. H. Thomison, of the Oxford Bar, and Prof. G. G. Hurst, Principal University Training School, awarded the prize to Mr. Toney Arnold Hardy, Gulfport, Miss.

ORATION

The establishment of truths—eternal, unchangeable, immutable—is never wrong. Recognizing no sanctity or infallibility in acts and opinions relating to the South that she should escape historical criticism or be exempt from all the tests of truth and honor, it is the filial duty of the living New South to reconstruct those ideas and opinions in so far as they are based on ignorance or prejudice; for as now written, if accepted in future years, they will consign the South to infamy and clothe the gallant Confederate soldier, as it were, with the fatal shirt of Nessus, fatal to honor, to energy, to noble development, to true life.

That the war had its origin in *opposing principles* which in their action upon the conduct of men produced the ultimate collision of arms, and that slavery, so called, was but the question, among others, by which these antagonistic principles which had been in conflict from the beginning were finally brought into actual and active conflict on the field of battle, may be assumed as an unquestionable fact. The line of demarcation between the opposing principles may be drawn on the cardinal question of construing the Constitution of the United States. The contest was between those who held it to be *strictly Federal* in character and those who maintained it to be *thoroughly National.* If Federal, sovereignty resides in the people as they were originally formed in the colonies and afterwards into States; if National, sovereignty resides in the people as they are merged into the mass, one indivisible whole; if the States are united by compact which prescribes no period for

the duration of their union, then in accordance with the doctrine of secession, as laid down by Rawle and Tucker, and Webster and Story, any State may of right secede without any cause or reason for its withdrawal.

In order to understand what led to the adoption of the Constitution and what kind of government was established by that instrument, whether Federal or National, it has seemed necessary to ascertain the origin and history of the forces in operation anterior to, as well as those concurrent with, the formation of the Constitution, which forces were really the source of its existence. This has been accomplished by searching into the authentic records of official acts, often forgotten, obscured or hid away, and by placing upon them the original, natural and rational interpretation.

No one denies that each colony, distinct in origin, was separate from and independent of the others, the common bond of allegiance being through the British Crown; and that this sovereignty had not been jointly over all but separately over each, and might have been abandoned as to some and retained as to others. Yet it is avowed that when through repeated breaches of chartered privileges and lawless encroachments upon well established rights, these colonies threw off the common bond—the British Crown—that they changed politically the relation subsisting between them. Bold assumptions and misconceptions are these, to thrust upon the Declaration of Independence, which created no new institutions, was in no sense a charter of government, or of a constitution, the instrumentality which could have suddenly and violently jerked the colonies into one paramount, indivisible sovereignty of one people. These

colonies became, according to their declaration, not an independent nation, but free and independent States. How manifestly illogical is an appeal to that instrument as a source of congressional power!

This very need for a prompt and more effective action than could be secured by tedious and uncertain appeals to their constituent bodies—States now—led to the adoption of the Articles of Confederation: a compact entered into by the States, to which the States as free, sovereign and independent political communities were the parties. Was any purpose exhibited by an entry into this compact to abandon their sovereignty, authority or independence? On the contrary, is it not shown that they clung to these as an object of dearest, unyielding desire, demonstrated in strong, unmistakable language by that section of the Articles of Confederation which provides that "each State retains its sovereignty, freedom and independence and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled"? But this "rope of sand" did not mend matters. That most fundamental of all the attributes of sovereignty was lacking; its behests were unenforcible. The impotence of treaties, financial disaster, commercial depression and social disorder caused many suggestions for enlarging powers and for a more efficient interstate organization.

One of two alternatives remained: either to invest Congress with larger powers or to supinely allow a collapse of the government. As a last hope, as the only feasible expedient, a Federal convention was called, as expressed in the resolution of Congress, "for the sole and express purpose of *revising* the Articles of Confederation." Not to change the nature

of the general government, but to delegate to it some additional powers and to adjust its machinery in harmony therewith. Such was the manifest object in assembling the delegates. But the great question with us is, *was* the *federative feature* of the "Union" changed by the new Constitution? A resort to the proceedings of the convention and to the face of the Constitution there framed yields the best evidence. If the ultimate sovereignty which unquestionably resided in the people of the States was, in fact, abandoned, and thereupon a National government endowed with ultimate, paramount sovereignty was presented to the whole American people, *en masse*, for adoption; if such a radical change was intended, contemplated, or in fact effected, the face of the Constitution and the proceedings of the convention, as a part of the *res gestae*, will truthfully disclose. "They are the title deeds of our political inheritance of constitutional liberty."

The convention, composed of delegates chosen by the States, immediately upon organizing resolved itself into a committee of the whole to consider the plan of government submitted by Governor Randolph of Virginia. To the very first resolution Governeur Morris of Pennsylvania offered the following substitute:

"*Resolved*, That a *National Government* ought to be established, consisting of a supreme, judicial, legislative and executive."

Governor Randolph's plan containing this substitute in the report of the committee came up before the convention for consideration. The entire bill was discussed pro and con; the ideas and objects of the members, generally, developed; and the bearing of this word "National" disclosed. Mr. Ellsworth of

Connecticut moved to expunge *National Government* from the first resolve and insert *Government of the United States* in its stead, "which was agreed to *nem. con.*" And wherever thereafter the words *National Government* occurred in Randolph's plan, they were stricken out and "Government of the United States," or its equivalent, was substituted. And why? The truth is, quite a number of delegates including Randolph, Hamilton and Morris, were in favor of abolishing the Federal system and for effecting a change of sovereignty by establishing a great National Government. But they were in the minority, and thus in the very first days of the convention were shattered the hopes of those who had dreamed of a great American empire.

Writers on the Constitution have asserted that one people, or a nation *de facto*, formed the Constitution, and the *preamble* has been the chief foundation upon which these authors and the constitutional lawyers of the North have built their arguments against the rights of the States as sovereign co-partners. Mr. Webster, in his great speech in the United States Senate in 1833, concludes with a dissertation upon this preamble:

"Finally, sirs," said he, "how can any man get over the words of the Constitution itself? '*We, the people of the United States, do ordain and establish this Constitution.*' These words must cease to be a part of the Constitution, they must be obliterated from the parchment upon which they are written, before any human ingenuity or human argument can remove the popular basis on which the Constitution rests, and turn the instrument into a mere compact between sovereign States."

But facts are stubborn things, and Mr. Webster's theory and the facts are incompatible. Here is what surviving contemporaneous records report:

On the 7th of August, 1787, a preamble reciting, "We, the people of the *States of New Hampshire, Massachusetts*, etc., do ordain, declare and establish the following Constitution," utterly negativing any idea of consolidation and preserving carefully the entity and distinct sovereignty of the States, was unanimously adopted. On the 8th of September following a committee was appointed "to revise the style of" not to change the meaning of, the articles. Four days later they made their report adopting the verbiage now found in the Constitution: "We, the people of the United States, etc." Why was this change in phraseology made and accepted? For a very obvious and conclusive reason. It was not known which of the States would ratify, and unlike the Articles of Confederation, unanimity was not required for its adoption or validity. It was to become obligatory on the States adopting when nine had ratified. Hence it would have been exceedingly inappropriate to set forth in advance the action of the States in their free and separate deliberations, a thing which no human prescience could forecast.

Patrick Henry, that matchless orator and purest of patriots, ably and formidably opposed the ratification of the Constitution in the Virginia convention. He, too, uninformed of the underlying facts, hurls mercilessly bitter denunciation, burning invective, and unveiled sarcasm at this same preamble.

"This proposal," said he, "of altering our Federal Government is of a most alarming nature. My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized

them to speak the language of 'we, the people,' instead of 'we, the States'? States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great, consolidated National Government of all the States."

Mr. Madison not only undermines this beautiful superstructure by a recital of the circumstances making necessary a change of phraseology, but with his usual accuracy of thought utterly demolishes its very elements. He produces from the same instrument cumulative proof, arriving at the inevitable conclusion, based as it is upon the rules of inexorable logic, that the States *are* the agents of this compact. He replied: "Who are the parties to it (the Constitution)? The people, but not the people as composing one great body, but the people as composing thirteen sovereignties. Were it as the gentleman (Mr. Henry) asserts, a consolidated government, the assent of a majority of the people would be sufficient for its establishment, and as a majority have already adopted it, the remaining States would be bound by the act of the majority even if they unanimously reprobated it; but, sir, no State is bound by it without its own consent."

Pursuant to their declaration of freedom, sovereignty and independence, each of the States had proceeded, in its own manner, at its own convenience, according to its own method, severally and distinctly, to frame and adopt a State Constitution and to organize the State government. Virginia, for example, on the 29th of the same month before the signing of the Declaration of Independence, performed the highest function of State sovereignty by establishing of her own free and sovereign will a Constitution which continued as the basis of her government until 1829.

But the time had now arrived for an entry into the more "perfect union." The labors of the delegates in the Constitutional Convention, as to that convention, were ended. The Constitution of the United States of America had been framed. Conforming to its enabling clause, that "the ratification of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same," the States by separate and distinct acts began the consideration of its provisions. The ablest men of the country, in action and in council, were drawn together in these State conventions. Divergence of opinion, developed in the Constitutional Convention, became more marked and distinctly defined. Debates were dramatic, spirited and strong. The opposition in nearly all of the States was bitter, stubborn and formidable, and the small majorities assenting attest the reluctance with which the people acceded to even a partial dominion. And why such decided opposition? Was it because the Constitution threatened the destruction of the autonomy of the States, centralizing power in a National head, and investing the new government with purse and sword? Only partially so. It is true that strong men criticised the inchoate Constitution as actually effecting these results: destroying the sovereignty of the States. But the great brunt of the opposition centered, not around the position that State sovereignty would be literally swept away; that the federative feature of the government under the Articles of Confederation would be supplanted by a consolidated, National Government, but, with an abiding conviction, and a prophetic knowledge it now seems to us, that those in authority would pervert to selfish aggrandizement the letter and spirit of the Constitution; that Con-

gress would not be confined to *enumerated powers*, and would abuse the *implied*. The predictions of Patrick Henry in the Virginia convention show the remarkable provision and sagacity of this friend of liberty. In his last speech before the convention, imploring the people not to ratify until, as a condition precedent, a Bill of Rights had been appended to the Constitution, he said:

"Whoever will advert to the use made, repeatedly, in England of the prerogative of the King, and the frequent attacks on the privileges of the people, notwithstanding many legislative acts to secure them, will see the necessity of *excluding implications*. Nations who have trusted to logical deductions have lost their liberty."

Reserve covenants, as convoys of safety, accompanied the ratification papers of most of the States, so fearful were the people, fresh from the defense of violated charters and faithless aggressions on inalienable rights, of the accretion of power by the Federal Government. Massachusetts and New Hampshire in ratifying proposed "as a safeguard to all the States" an amendment reserving to the several States, to be by them exercised, powers not expressly granted by the Constitution. South Carolina accompanied her accession to the Union with the following resolution: "This convention doth also declare that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them, and vested in the general government of the Union." Virginia announced with her ratification that the powers granted under the Constitution, being derived from the States, might be reassumed by them whenever the same shall be perverted to their injury and oppres-

sion," and further shielded the rights of the States by declaring that "every power not delegated remains with the States, and at their will." New York, to the same effect, with her ratification declared that the powers of government might be reassumed by the people whenever it should become necessary to their happiness, and that every power, jurisdiction and right that was not delegated to Congress remained to the several States, or to the respective State governments. Rhode Island withheld her ratification for three years on account of the power granted to Congress to regulate foreign and interstate commerce. Possessed of the best harbor on the Atlantic coast and an advantageous natural location for the carrying on of commerce, she entered the Union with marked diffidence, and only then upon a well grounded assurance, as avouched at the time of her ratification, that the "powers of government might be resumed whenever it should become necessary to her happiness." Rhode Island might have never entered the Union! It is material to this discussion and interesting to inquire, what relation politically she would have borne, in that event, to the individual States and to the Federal Government, which is tantamount to asking: Would Rhode Island have been an independent State or a territory under the Union? It is a naked, historical fact that the government under the Constitution did actually go into operation several months before either Rhode Island or North Carolina joined the Federal Union. The action of these States during that interval had not, most remotely, bound or civilly affected the action of the individual States or of the United States. Nobody pretended to any right of coercion, a heresy that was promulgated for the first time during General Jack-

son's administration by Mr. Webster, or of interference with the exercise by these States of any political sovereignty.

It seems conclusive of argument, after noting the particular, separate and several action of the States in ratifying, where the nature and character of the Constitution and the resulting union, as revealed by the debates, clearly indicate that while many apprehended danger from an encroachment upon the sovereignty of the States by *constructions and implications*, yet almost universally it was the avowed understanding of its nature by advocates and supporters, many of whom, like Hamilton and Madison, had favored a National Government in the Constitutional Convention, that it purported to be, according to the authoritative definition of Montesque, a Federal Constitution.

It is premised that the Union as created by the Constitution is a Union of States and not of peoples; that the Federal Government has been instituted *by* the States and *for* the States. Under the Articles of Confederation each State in determining all questions, it will be remembered, had but one vote irrespective of population. Bold and audacious though it may appear, it is confidently asserted without fear of successful contradiction that in this respect there is no *essential* change under the *new* Constitution. The fifth article provides the manner in which amendments may be made to the Constitution, expressly stipulating therein that no amendment shall ever be made, in any manner, which shall deprive the States of their *equal* suffrage in the Senate. Surely this truly remarkable instrument, of which England's most illustrious statesman has proclaimed that it is "more than the expression of calm wisdom and lofty

patriotism. It has its distinctive providential element," contains no surplusage, and this particular section came there through no mere inadvertence. What, then, if any, are the characteristic features of the American system of government which reflect the object and purpose of the delegates in the convention in framing a provision which makes *indestructible* the equal suffrage of the States in the Senate? It is answered: Can any measure be passed, any law enacted, can any man be appointed to any office of dignity or profit unless a majority of the States, by and through their Senators, favorably concur? And, further, as Alexander Stephens has forcibly suggested, "In fact, can the government in any of its phases and function be operated at all, if a majority of the States in the Senate refuse their co-operation?" The Supreme Court of the United States has so held. In *Cohens* v. *Virginia*, Chief Justice Marshall uses this language: "It is true that if all the States or a majority of them refuse to elect Senators the legislative power of the government will be suspended." Alexander Hamilton, the great exponent of a consolidated government in the Constitutional Convention, when the Constitution was before the New York State Convention for ratification, in an attempt to reconcile the opposition, who contended that the Constitution would destroy the sovereignty of the States, declared: "The Union is dependent upon the will of the State governments for its Chief Magistrate and for its Senate. . . . . The States can never lose their powers till the whole people of America are robbed of their liberties!" And 'tis well said of him that "his mind never gave utterance to a mightier truth."

James Madison, whose wisdom and patriotism and sagacity and ceaseless action are to be found on every

page of the records of the convention, did not consider the federative character of the previously existing Union under the Articles of Confederation *essentially* changed by the new Constitution. In the "Federalist" the papers by which the States were prepared for intelligent consideration of the determinations of the convention, he thus reports of the *general nature* of the powers delegated under the Constitution:

"If the new Constitution be examined with accuracy and candor, it will be found that the changes which it proposes consist much less in the additon of *new powers* to the Union than in the invigoration of its *original powers*. . . . The powers relating to war and peace, armies and fleets, treaties and finances, *with the other more considerable powers*, are all vested in the existing Congress under the Articles of Confederation. The proposed change does not enlarge these powers, it is only substituting a more effectual mode of administering them."

Words of what import! The "Chief Author of the Constitution," as the historian Bancroft styles him, publishing that all the more considerable powers under the Constitution were vested in Congress under the Articles of Confederation.

Examined in the light of the forces which were the source of its existence, analyzed with reference to its objects and purposes, the Constitution unequivocally sustains the principle for which the South contended in war and in peace, does still maintain, that all the functions which the United States Government possesses spring from and depend upon a compact between the States just as it did under the Articles of Confederation.

The South was the dominant power in the government from the foundation of the Federal Union to

1830. Throughout these years she had been loyal to the Constitution, earnestly contending for rights which were in that bond, conscientiously adhering to her convictions, respecting the rights of the minority and battling against usurpations of powers which were not therein granted, though she might have wielded, had she been so inclined, to her own advantage. When at last all her efforts to conserve the Constitution and the sovereignty of the States, or to have them recognized in the administration of Federal affairs, were proven utterly hopeless, she simply, and as we think, with great dignity withdrew from the Union. What was the South to do? Stripped of all extraneous matter the naked issue presented to her was whether to maintain the Nation irrespective of the fundamental law or the autonomy of the States, or to preserve under new relationships constitutional principles and the rights of the States.

Impelled by all that a people hold dear—safety, liberty and honor—South Carolina, in conformity with the legal maxim, "*unum quoque dissolutor co modo qua calligator*" (everything is dissolved by the same means it is constituted), met in convention and repealed her ordinance of 1788, the formal act which had made her a constituent member of the Union, and thus dissolved the Union subsisting between her and the other States united with her under the Constitution of the United States of America. It is to be remembered that the action of South Carolina—and of the other Southern States—was no exercise of a novel claim; no new pretention advanced under the pressure of an emergency, but was claimed as a prerogative of sovereignty. From the very origin of the Union, in the Constitutional Convention, in every administration, in the origin and history of political parties, by

writers, statesmen, and jurists, the right of a State for just cause, of which she was the sole judge, to secede had been argued and asserted. This section of the country is commonly adjudged and depicted by the literature of the North, impetuous, hot-headed and revolutionary. Yet history chronicles no mutinies, no Shays Rebellions, no Arnolds, no Hartford convention—a secret conclave gotten together in a time of war when the country was hard pressed by a foreign foe for the purpose of disrupting the government—or in fact anything to mar the luster of her brilliant career. Rich in patriotism, in intellectual force, in civic and military achievements, she advances, bearing with her the proud heritage advocated in council chamber, justified at the bar, and vindicated in battle, principles which constituted the Southern States the true defenders of the Constitution and the Union.

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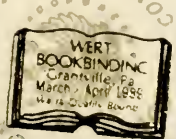
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